83-805

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No.

IN THE

United States Supreme Court

OCTOBER TERM, 1983

CHERYL WILCOX WILLIAMS,
Petitioner,

v.

TEXAS DEPARTMENT OF HUMAN RESOURCES, and TARRANT COUNTY CHILD WELFARE DEPARTMENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT FORTH WORTH, TEXAS

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QUESTION PRESENTED FOR REVIEW

I.

Whether the termination of Petitioner's parental rights under the applicable Texas statute was violative of her right to due process of law and liberty interests protected by the Fifth and Fourteenth Amendments where the applicable statute does not require that the trier of fact find that the State's legitimate interest in the protection of minor children could not be served by imposition of a less extreme and restrictive remedy?

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TEXAS DEPARTMENT OF HUMAN RESOURCES, and TARRANT COUNTY CHILD WELFARE DEPARTMENT,
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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT FORTH WORTH, TEXAS

OPINIONS BELOW

The opinion of the Texas Court of Appeals is unpublished. A copy of the opinion is attached to this petition as Appendix A. The Texas Supreme Court denied Petitioner's application for writ of error and a copy of this order is attached as Appendix B.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28 U.S.C., Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment provides, in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The applicable state statutory provision which governs termination of parental rights in cases such as this one is Texas Family Code, Section 15.02 (Vernon Supp. 1982), which provides:

> "A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the Court finds that:
>
> 1) the parent has:
>
> D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or
>
> E) engaged in conduct or knowingly placed the child with persons who en-

gaged in conduct which endangers the physical or emotional well-being of the child (and)

2) termination is in the best interest of the child.

STATEMENT OF THE CASE

Summary of Material Facts

The facts related in the opinion of the Texas Court of Appeals are essentially correct, except where additional facts not noted by the court are deemed relevant by Petitioner to the point raised in this application. The evidence adduced at trial showed that both minor children of Petitioner were subjects of child abuse referrals to the Department of Human Resources. Medical records demonstrated that the younger child had sustained a fractured arm and bruises at eight months of age. There was conflicting evidence regarding the Petitioner's knowledge concerning the circumstances under which the injuries were inflicted and her prior statements concerning those circumstances, but viewing the evidence most favorably in light of the judgment, it appears that the jury found that Petitioner knew or believed that her then-boyfriend and present husband inflicted the injuries and she sought to cover-up or disclaim knowledge of this fact. The medical evidence demonstrated that the baby had also suffered severe head injuries and numerous bruises. Petitioner's older child was also the subject of a child abuse referral and the testimony demonstrated that she had suffered bruises on her face.

The thrust of the State's case at trial was that Petitioner was aware that her boyfriend had injured her children, yet continued to leave them in his care thereafter. A psy-

chologist testified that the older child feared the boyfriend and also, the Petitioner apparently failed to recognize signs of child abuse inflicted upon her children.

Petitioner contends that the following facts, omitted from the review of the evidence in the Court of Appeals opinion, are relevant for consideration of the point brought before this Court in this application:

1) . Petitioner testified that she did not challenge a change of conservatorship, but that she did not wish to have her rights terminated because she wished to prove herself a fit mother for her children, (Tr, 66-67);

2). Petitioner testified that she was attending parenting counseling courses to improve her parenting skills, (Tr, 55);

3). The attorney ad litem, appointed by the trial court to represent the interest of the children, urged in argument to the jury that Petitioner's parental rights not be terminated, (Tr, 195-196);

4). The psychologist who testified, Dr. Cooley, stated that the older child feared Petitioner's boyfriend, but did not fear her mother, (Tr, 157-158). He also testified that Petitioner was unable to admit to herself that her children were being abused by the boyfriend, (Tr, 160-161), and that Petitioner posed no direct threat to the children in terms of the possibility of her commission of abusive acts. Dr. Cooley was called as a witness by the attorney ad litem.

5). There was no testimony at trial that Petitioner herself committed abusive acts toward her children;

6). Caseworkers Norton and Stockton, who testified as witnesses for the State, testified that Petitioner and her

children expressed love and affection toward each other, (Tr. 81-82, 89-90; 41-43, 48-50);

6). The uncontroverted opinion of all witnesses who testified was that Petitioner would not, herself, abuse her children.

The jury found, however, that Petitioner had placed or allowed her children to be placed in an environment which threatened their physical or emotional well-being and the trial court entered an order terminating her parental rights and appointing the Texas Department of Human Resources as managing conservator of the children. (R, 48, 47-49).

Texas Court of Appeals Opinion

In her direct appeal to the Texas Court of Appeals, Petitioner raised and briefed the following issue:

> "TERMINATION OF APPELLANT'S PARENTAL RIGHTS BASED ON TEXAS FAMILY CODE, SECTION 15.02(1)(D) AND (E) IS UNCONSTITUTIONAL, IN VIOLATION OF BOTH THE UNITED STATES AND TEXAS CONSTITUTIONS."

The Court of Appeals responded to this point in its opinion by noting that prior decisions of Texas courts had construed termination of parental rights under the applicable section to be a valid exercise of the State's power to protect minor children. The Court first concluded that the evidence was legally and factually sufficient to demonstrate her unfitness as a parent and second, that:

> "The Texas Family Code does not require the State to prove that there are no other alternatives available for the protection of the children in order to terminate parental rights."

(Slip opinion, at 4). It is the application of the termination procedure in cases in which a less restrictive alternative would adequately serve the State's goal which Petitioner here argues violates her significant, recognized liberty interests protected by the United States Constitution. Although Petitioner predicated her argument in the Court of Appeals on the same decisions of this Court which are herein relied upon, the court below did not rule on the issue of violation of the federally protected liberty interests claimed by Petitioner, other than to hold:

> "The State did prove that appellant was an unfit parent and that her parental rights should be terminated. This does not violate the United States or Texas constitutions."

(Slip opinion, at 4-5).

REASONS FOR GRANTING THE WRIT

This Court has long recognized the constitutional protections which serve to promote the family relationship. *Wisconsin v. Yoder,* 406 U.S. 205, 231-233 (1972); *Stanley v. Illinois,* 405 U.S. 645 (1972); *Meyer v. Nebraska,* 262 U.S. 390, 399-401 (1923); and *Prince v. Massachusetts,* 321 U.S. 158 (1944). In *Prince,* the Court observed:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

321 U.S., at 166. Similarly, the Court observed that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment" in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-640 (1974).

Petitioner raised two contentions in the court below: first, that application of the Texas termination statute to her was improper because the jury was permitted to find her an unfit parent based merely upon her failure to take proper action after acts of abuse had been committed by others upon her children; and second, because the statute does not require the State to pursue or the jury to find that a less restrictive alternative – than total termination of parental rights – would not serve the State's goal of protecting minor children as effectively as termination. The Texas court found that the evidence was legally and factually sufficient to support a finding of Petitioner's unfitness as a parent based upon her omission or failure to act to protect her children adequately in light of the circumstances. With regard to the second contention, however, the court concluded that the statute did not affirmatively require the State to elect to pursue the least restrictive alternative capable of insuring the State's interest and goal in protecting minor children from acts of abuse.

Petitioner asserts that the statute, as applied in her case, violates federally protected liberty interests which have been recognized to flow from the family relationship. The State could have as readily achieved its goal by moving for change of conservatorship in this case, as by seeking termination of Petitioner's parental rights. Not only has Petitioner been denied custody of her children, she has been denied all rights to participate in their lives despite the unequivocal evidence adduced at trial that she never had abused the children herself, and likely would not, given her demonstrated love and affection toward them. The Texas court concluded:

> ". . . The children involved are entitled to a chance at a loving and stable family life without

> the threat of having that destroyed by the mother coming in at a later time and asking for the children."

(Slip opinion, at 5). The court thus disposed of Petitioner's testimony at trial that she would like to have an opportunity to prove herself a fit mother after outlining the steps she had taken toward that goal. The court's conclusion ignores the testimony that the children demonstrated love toward Petitioner, and wholly ignored the possibility that at some future point, Petitioner might indeed have proven herself sufficiently fit to warrant a second change in custody, restoring her status as managing conservator. Moreover, the court simply refused to consider the interests of the minor children in a continuation of some legal relationship with their mother, for whom they demonstrated love and affection.

Petitioner contends that it is precisely because of the extreme and final nature of termination of parental rights that this remedy should be applied in the most limited circumstances and only upon an express finding that the unfitness of the parent requires termination. *See Stanley v. Illinois, supra; Quilloin v. Walcott,* 434 U.S. 246, 248-249 (1978); *Smith v. Organization of Foster Families,* 431 U.S. 816, 862-863 (1977) (concurring opinion of Stewart, J.). The "unique kind of deprivation" involved in termination of parental rights has been recognized by this Court, *Lassiter v. Department of Social Services of Durham County,* 452 U.S. 18, 27 (1981); *May v. Anderson,* 345 U.S. 528, 533 (1953); *Armstrong v. Manzo,* 380 U.S. 545 (1964), resulting in the ruling that this result can only be achieved upon a showing of "clear and convincing evidence" that termination is proper in the circumstances of the case. *Santosky v. Kramer,* __ U.S. __, 102 S.Ct. 1388 (1982). There, the Court noted:

> "The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened family bonds, it must provide the parents with fundamentally fair procedures."

102 S.Ct, at 1394.

Petitioner did not attempt to resist a change in conservatorship of her minor children and indicated by her testimony that she recognized that her boyfriend, now husband, was resposnible for the abuse of her children. Under Texas law, of course, this type of situation has been deemed to justify a change in conservatorship for the protection of similarly situated children. *Evans v. Tarrant County Child Welfare Unit*, 550 S.W.2d 144 (Tex.Civ. App. 1977). A similar approach should have been taken in Petitioner's case and, indeed, was suggested by the attorney appointed to represent the interests of the minor children at trial in his argument to the jury. (Tr, 195-196). While Petitioner's "unfitness" may have been demonstrated by her inability to protect her children from their natural father and her current husband, this fact does not justify the conclusion that both Petitioner and her children should be denied their mutual interest in their natural relationship.

Absent a showing that change in conservatorship could not have provided sufficient protection for the minor children from continued abuse or their mother's continued failure to act to protect them from that abuse, Petitioner contends that this remedy should be a prerequisite to termination in cases such as this. Otherwise, the family liberty interests protected by the constitution are too readily jeopardized by the zealous exercise of the power to seek termination by the State. While that zeal may be justified in many cases, the facts of this case demonstrate that the power was exercised indiscriminately and without a proper consideration of the consequences of termination upon the rights of all parties, including those of the minor children who have likewise suffered a termination of their rights to their natural mother.

CONCLUSION AND PRAYER

Termination of Petitioner's parental rights was an excessive remedy in this case, given the testimony at trial showing that she had not committed acts of abuse personally and that she and her children maintained a loving and affectionate relationship. Application of the Texas termination statute in this case violated her constitutionally protected liberty interests arising from the family relationship, where the state's legitimate interests in protecting Petitioner's children from further abuse could have been achieved through the less restrictive and severe remedy of change of conservatorship with imposition of proper safeguards for visitation. Based on the foregoing argument, Petitioner prays that this Court issue a writ of certiorari to the Texas Court of Appeals to review the judgment of that court.

Respectfully submitted,

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November 1983

APPENDIX A

NO. 2-82-139-CV

IN THE COURT OF APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS

IN THE INTEREST OF J.W. AND T.W. – CHILDREN

FROM THE 323rd DISTRICT COURT
OF TARRANT COUNTY

OPINION

The Texas Department of Human Resources and Tarrant County Child Welfare Department instituted this action against the natural mother of J.W. and T.W. to terminate her parental rights under TEX. FAMILY CODE ANN. § 15.02 (Supp. 1982). Trial was to a jury which found that the mother had knowingly placed or allowed the children to remain in conditions or surroundings which endangered their physical or emotional well-being and that she knowingly allowed them to be in the presence of persons who engaged in conduct which endangered the physical or emotional well-being and that termination of the parent-child relationship would be in the best interest of the children. A Decree of Termination was then entered from which the mother brings this appeal.

We affirm.

The first two points of error assert that there was no evidence or, alternatively, insufficient evidence to support the jury's finding that termination of the parent-child relationship would be in the best interest of the children.

The evidence at trial showed that the Department of Human Resources received two referrals dealing with these children. The first one was January 1, 1981 and the medical records introduced at trial showed that J.W. had a fractured arm and bruises. The child was eight months old at the time. The injury supposedly happened when the baby fell out of his bed. At trial the mother stated that the injury happened while she was at work and her boyfriend was baby-sitting the children. Other witnesses testified that the mother admitted to them that she was present when the baby's arm was broken.

The second referral came on January 30,1981 when J.W. was taken to the hospital by his grandmother. The mother testified that she noticed nothing wrong with the child when she took him to the baby-sitter that morning. Dr. Bruce, the doctor who examined the child at the hospital; testified at trial that J.W. had a broken leg which was very swollen and that the average person should have noticed it. Moreover, she said that the leg had been broken for at least two weeks. J.W. also had a skull fracture, bruises on his face, back, sternum and thigh, and two healing scars. Pamela Norton, a social worker, went to the sitter's house to speak with T.W., the little girl, who had bruises on her face also.

The mother testified that the broken leg could have happened when the baby fell off her lap some days prior to his hospital visit. Dr. Bruce testified that it would be unlikely that a simple fall would produce the kind of fracture J.W. had. She stated it would take a fairly severe force with some twisting to cause the fracture. The mother's boyfriend (and now husband) pled guilty to injuring J.W.

Dr. Cooley, a psychologist who examined the natural mother, testified that the little girl, T.W., was afraid of

her stepfather. From her behavior and responses she appeared to have experienced trauma. He also testified that the children's mother would fail to recognize signs of abuse.

The mother admitted at trial that she thought her boyfriend had injured her child because he was the only one home when the little boy's arm was broken in December. She continued to leave her children with him, however, and they were injured again.

In parent-child termination proceedings the "clear and convincing evidence" standard must be applied. It is defined as "that measure or degree of proof which will produce in the minds of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *In Interest of G.M.*, 596 S.W.2d 846 (Tex. 1980).

The evidence in this case was sufficient to support the jury's finding that termination of the mother's parental rights would be in the best interest of the children. This case is similar to the facts in *W.H. v. Moore*, 591 S.W.2d 645 (Tex.Civ.App. – Dallas 1979, no writ) where the termination was upheld. There the mother knew about the injuries and continued to leave the children with her boyfriend. The first two points of error are overruled.

The third and fourth points of error assert that there is no evidence, or at least insufficient evidence, to support the jury's finding that appellant placed her daugher, T.W., in a position or circumstances to suffer harm or injury to her physical or emotional well-being.

Pictures were introduced at trial which showed bruises to the daughter's face. Mrs. Norton related instances of abuse that T.W. stated she had seen and experienced. As

stated earlier, Dr. Cooley testified that T.W. was afraid of her mother's husband and had experienced trauma.

The Texas Family Code does not require that a child must be injured before the parental relationship can be terminated. The court in *Lane v. Jefferson County Child Welfare Unit*, 564 S.W.2d 130, 132 (Tex.Civ.App.—Beaumont 1978, writ ref'd n.r.e.) stated:

> Many violent acts could be committed in the child's presence, but not directed toward the child, in such a manner as to actually endangered the child's physical well-being.

Allred v. Harris County Child Welfare Unit, 615 S.W.2d 803, 806 (Tex.Civ.App.—Houston[1st Dist.] 1980, writ ref'd n.r.e.) also pointed out that "It is not necessary that the conduct be directed at the child or that the child actually suffers injury."

The evidence here is sufficient to show that the physical and emotional well-being of T.W. was endangered and that the mother's inaction allowed her to remain in those conditions. The third and fourth points of error are overruled.

The fifth point of error proposes that termination of her parental rights is unconstitutional as applied to this case. Appellant advances two theories in support of her contention: first, the evidence adduced by the State at trial fails to demonstrate her unfitness as a parent sufficiently to justify termination; and second, the termination of parental rights is not the least restrictive means by which the State could have elected to pursue its goal of protecting the interests of the appellant's minor children.

Several courts have considered and upheld the constitu-

tionality of TEX. FAMILY CODE ANN. § 15.00(1)(D) and (E); *D.F. v. State,* 525 S.W.2d 933 (Texas.Civ.App. – Houston [1st Dist.] 1975, no writ); *Gonzales v. Texas Department of Human Resources,* 581 S.W.2d 522 (Tex. Civ.App.–Corpus Christi 1979, writ ref'd n.r.e.); *Sanchez v. Texas, Department of Human Resources,* 581 S.W.2d 260 (Tex.Civ.App.–Corpus Christi 1979, no writ); *Crawford v. Crawford,* 569 S.W.2d 505 (Tex. Civ.App.–San Antonio 1978, no writ); *Lane v. Jefferson County Child Welfare Unit,* supra.

Section 15.02 of the Family Code sets forth the requirements for the involuntary termination of parental rights. It requires either conduct on the part of the parent or knowledge that they are placing the child in a dangerous environment or with a dangerous individual.

The evidence produced at trial demonstrated appellant's unfitness as a parent. She placed her children with a person she knew had already harmed one of her children. She also failed to seek medical treatment for her child. The doctor indicated the leg had been broken for two weeks. Appellant contends that these actions were an error in judgment and that she should be allowed to retain her parental rights so that at some later time she could prove her fitness as a parent.

The Texas Family Code does not require the State to prove that there are no other alternatives available for the protection of the children in order to terminate parental rights. *In Re L.F., T.F. and W.F., Jr.,* 617 S.W.2d 335 (Tex.Civ.App.–Amarillo 1981, no writ). The State did prove that appellant was an unfit parent and that her parental rights should be terminated. This does not violate the United States or Texas Constitutions. The children involved are entitled to a chance at a loving and stable fami-

ly life without the threat of having that destroyed by the mother coming in at a later time and asking for the children. The fifth point of error is overruled.

The sixth point of error asserts that the trial court erred in overruling appellant's objection to the use of hearsay by the State's witness. The statements in questionwere made by the daughter, T.W., and were related to the jury by the caseworker who intereviewed the child.

The State contends that these statements were admissible as an exception to the hearsay rule to show the children's state of mind. We agree. The statements were relevant to the issue of whether the mother's conduct endangered the well-being of the children. *Melton v. Dallas County Child Welfare Unit of Texas Department of Human Resources,* 602 S.W.2d 119 (Tex.Civ.App.—Dallas 1980, no writ). The point of error is overruled.

The seventh point of error complains that the trial court erred in overruling appellant's objection to the testimony of Dr. Bruce, which was based on the conclusions of another non-testifying expert. Dr. Bruce stated at trial that she looked at the X-rays, but primarily relied on the interpretation of the radiologist in forming her opinion about the child's injuries.

The Supreme Court in *Moore v. Grantham,* 599 S.W.2d 287 (Tex. 1980) set forth the law in relation to expert opinion testimony: "[W]here it appears a witness' testimony is predicated both upon personal knowledge and upon hearsay, his testimony is admissible."

In the present case, the doctor testified that she had personally examined the child and the X-rays. Although she admitted relying on the interpretation of the radiologist,

she also admitted being able to determine the injuries from the X-rays. This shows that her opinion was based at least in part on personal knowledge and was therefore admissible. The seventh point of error is overruled.

Appellant's last point of error contends that the trial court erred in overruling her objection to the State's closing argument. The argument complained of is as follows:

> Mrs. Boyd: Mrs. W ____ is living with a man that's pled guilty to injurying a child. She knows that. I believe she did know that. She left her child with that man.
>
> Mr. Stanley: I will object to that. There is no testimony she knew this back on January 30, 1981.
>
> The Court: Overruled.
>
> Mrs. Boyd: I will refresh your memory on the testimony. I asked Mrs. W ____, "When did you believe that Mr. Teddy Joe Williams was injuring your child?" Her answer was, "When the injury, the fracture to the right arm occurred." When did that occur? December 21, 1980.

Before a judgment should be reversed because of argument of counsel it must be improper and must be such as to satisfy the reviewing court that it was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case. *Aultman v. Dallas Railway & Terminal Co.*, 260 S.W.2d 596 (Tex. 1953).

Every statement made by the prosecutor was supported by the evidence and was proper when considered as a whole. The eighth point of error is overruled.

The judgment is affirmed.

W.A. HUGHES, JR.
JUSTICE

PANEL A
FENDER, C.J.; HUGHES AND JORDAN, JJ.
DO NOT PUBLISH
TEX. R. CIV. P. 452.

MAY 12 1983

APPENDIX B

THE SUPREME COURT OF TEXAS
P.O. BOX 12248 CAPITOL STATION
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September 14, 1983

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Re: N. C-2310, IN THE INTEREST OF J.W. AND T.W.

Dear Attorneys:

The application for writ of error in the above referenced case was this day refused with the notation, No Reversible Error.

Very truly yours,

GARSON R. JACKSON, Clerk

By /s/, Deputy
Fritzi Born

Office - Supreme Court, U.S.
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DEC 14 1983
ALEXANDER L. STEVAS
CLERK

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Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the termination of Petitioner's parental rights under the applicable Texas statute was violative of her right to due process of law and liberty interests protected by the Fifth and Fourteenth Amendments where the applicable statute does not require that the trier of fact find that the State's legitimate interest in the protection of minor children could not be served by imposition of a less extreme and restrictive remedy?

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83-805

IN THE
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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Petitioner has alleged that termination of her relationship with her children violated her right to due process of law because Texas law does not require the trier of fact to find that there is no less restrictive remedy than termination which will serve the State's legitimate interest in protecting children. The State Court of Appeals reviewed the evidence and found it constitutionally sufficient to satisfy due process requirements. Because the Texas Family Code provisions covering termination recognize and protect the interest asserted by Petitioner, this Court should not grant the petition for certiorari.

ARGUMENT

In the present case the Petitioner argued in the state courts that Texas Family Code, Section 15.02 (Vernon 1982) was unconstitutional *as applied* to her because it did not require the state to prove, and the evidence did not show, that no remedy less restrictive than termination existed.

The facts of Petitioners case are as follows:

> The evidence at trial showed that the Department of Human Resources received two referrals dealing with these children. The first one was January 1, 1981 and the medical records introduced at trial showed that J.W. had a fractured arm and bruises. The child was eight months old at the time. The injury supposedly happened when the baby fell out of his bed. At trial the mother stated that the injury happened while she was at work and her boyfriend was baby-sitting the children. Other witnesses testified that the mother admitted to them that she was present when the baby's arm was broken.
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> The second referral came on January 30, 1981 when J.W. was taken to the hospital by his grandmother. The mother testified that she noticed nothing wrong with the child when she took him to the baby-sitter that morning. Dr. Bruce, the doctor who examined the child at the hospital; testified at trial that J.W. had a broken leg which was very swollen and that the average person should have noticed it. Moreover, she said that the leg had been broken for at least two weeks. J.W. also had a skull fracture, bruises on his face, back, sternum and thigh, and two healing scars. Pamela Norton, a social worker, went

to the sitter's house to speak with T.W., the little girl, who had bruises on her face also.

The mother testified that the broken leg could have happened when the baby fell off her lap some days prior to his hospital visit. Dr. Bruce testified that it would be unlikely that a simple fall would produce the kind of fracture J.W. had. She stated it would take a fairly severe force with some twisting to cause the fracture. The mother's boyfriend (and now husband) pled guilty to injurying J.W.

Dr. Cooley, a psychologist who examined the natural mother, testified that the little girl, T.W., was afraid of her stepfather. From her behavior and responses she appeared to have experienced trauma. He also testified that the children's mother would fail to recognize signs of abuse.

The mother admitted at trial that she thought her boyfriend had injured her child because he was the only one home when the little boy's arm was broken in December. She continued to leave her children with him, however, and they were injured again.

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On the basis of this evidence, the appellate court found clear and convincing evidence to support the jury's findings that Petitioner had knowlingly endangered her children *and* that it was in the children's best interest to terminate Petitioner's parental rights.

In response to Petitioner's factual contention that she should have been given more time in which to rehabilitate herself, the Court should note that these children were

removed in January of 1981 and that the termination hearing was in May of 1982.

The issue presently presented by Petitioner for the first time is whether or not Section 15.02 of the Texas Family Code is, *on its face*, violative of her right to due process of law because it does not require a *finding* in each case that the State's legitimate interest in the protection of children could not be served by a less extreme and restrictive remedy than termination. The proof which is required by Section 15.02 satisfies the requirements of due process.

Texas Family Code, section 15.02 sets out a two-pronged approach to involuntary termination of parental rights. Subsection (1), (A) through (K), sets out facts which must be proven to show a parent unfit. Subsection (2) provides that termination must also be in the best interest of the child involved for involuntary termination to be ordered. Termination cannot be supported by proof satisfying only one of the subsections, and proof must be by clear and convincing evidence. In determining the "best interest" question a trier of fact must necessarily consider those protected interests asserted by petitioner.

Starting from the presumption that the best place for a child is with its parents (*Wiley v. Spratlan*, 543 S.W.2d 349 (Tex.1976)), the fact finder must determine whether or not termination is necessary in the child's best interest. A list of factors which must be considered in determining best interest includes but is not limited to the following: (A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child: (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent

which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent. *Holly v. Adams*, 544 S.W.2d 367 (Tex. 1976).

In considering the child's "best interest" Texas law provides protection for the liberty interest asserted by petitioner. The fact that no specific finding is required concerning alternatives to termination in no way affects the requirement that they be considered.

Respondent asserts that the facts support termination in the present case and that no constitutional harm is presented by the fact that the Texas statute does not specifically require a finding by the fact finder that no less restrictive alternative exists.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the _____ day of _____, 1983 to Mr. Randy Taylor, 1015 Elm, Suite 2110, Dallas, Texas 75202 and Mr. J. Thomas Sullivan, 400½ Cortez Place, Santa Fe, New Mexico 87501.

_____

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